SUPREME COURT, U. S.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1971

No. 71-1289

METROPOLITAN SEWERAGE COMMISSION OF THE COUNTY OF MILWAUKEE,

Petitioner,

v.

FATTORE COMPANY, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND REQUEST FOR SUMMARY REVERSAL

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The petitioner, METROPOLITAN SEWERAGE COMMISSION OF THE COUNTY OF MILWAUKEE, prays that a writ of certiorari issue to review the opinion and order of the United States Court of Appeals for the Seventh Circuit in this matter.

OPINIONS BELOW

The opinion of the Court of Appeals, as yet unreported, appears at Appendix A, pp. 25-41. The opinion of the District Court is reported at 324 F. Supp. 354 and appears at Appendix B, pp. 42-52.

JURISDICTION

The order of the Court of Appeals was entered on December 15, 1971. A timely motion for rehearing was made and denied on January 10, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Whether the Court of Appeals applied proper rules of contract construction in a diversity case based on a Wisconsin contract in the following respects:

1. The application of United States Court of Claim's rules of construction of federal contracts based on federal procurement policy to determine that portions of the Wisconsin contract were legally ineffective.
2. The manner in which the Court of Appeals construed the provisions of the contract relating to subsurface soil conditions and additional compensation.

STATUTE INVOLVED

The pertinent statute is 28 U.S.C. 1652, which provides:

> "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."

STATEMENT OF THE CASE

This diversity case is an action for additional compensation of approximately Three Million Dollars

($3,000,000.00) for construction of a large, deep-tunnel sewer. The action was based on the contract and common law theories of misrepresentation and breach of warranty. The latter theories were dismissed by the District Court for lack of proof and the Court of Appeals affirmed on these points.

The contract portion of the action was dismissed by the District Court on grounds that as a matter of law the contract did not provide a basis for recovery. The Court of Appeals reversed on this point. An affirmative defense of final payment-release was the initial basis for dismissal by the District Court and this reversal is not challenged here.

The Commission furnished bidders with plans and specifications for the sewer. On the plans were shown conditions encountered by seven test holes drilled to the depth of the sewer. The materials encountered were essentially sand, gravel and clay. The borings had to be offset some distance from the actual sewer location to alleviate the danger of compressed air blowing out of the test points during construction. Tunnels are commonly pressurized to aid in keeping water out. Blowouts subject workmen to serious danger. The borings were taken at 1,000 foot intervals and the locations of them were shown on the drawings.

The contract and the evidence showed the Commission's purpose in making the tests was to determine the character of the ground for design purposes. The instructions to bidders, which were incorporated into the contract, stated that the Commission would not guarantee the accuracy of the boring data as indicative of actual conditions, that the Commission anticipated conditions would vary from those found at the points tested

and that the contractor would be held responsible for determining actual conditions for himself and there would be no adjustment for failure to accurately account for them in his bid price.

The contractor encountered rock in varying amounts which it alleges required it to use a more expensive method of construction than its bid contemplated.

The District Court held that the changed conditions provision of the contract (Appendix B, pp. 42-52) did not provide a basis of recovery, for two conditions precedent were not satisfied:

a) The drawings did not show any conditions at the site nor did they purport to.

b) No conditions were encountered which reasonably required a change in the design of the sewer.

The Court of Appeals reversed, holding on the basis of Court of Claim's precedent, that the test boring data was a matter of law shown as a representation of actual site conditions and that being so the qualifying language allocating the burden to the contractor must, as a matter of law, be disregarded. It further held that conditions requiring a design change were not necessary and the language, relating to that point, merely required that the engineer conform the documents to the actual fact.

REASONS FOR GRANTING THE WRIT

1. The Decision Below Rests on Court of Claims Principles of Contract Construction Based on Federal Procurement Policy Which is in Conflict With Applicable Wisconsin Law and With Applicable Decisions of This Court Based on Common Law.

This was a diversity case involving a Wisconsin contract and the Federal Courts are bound to use Wisconsin

Law for substantive rules of decision. 28 U.S.C. 1652 as construed in *Erie R. R. Co. v. Thompkins,* 304 U.S. 64 et al.

The Court of Appeals applied Court of Claims decisions holding that a cause of action is sufficiently established under a Changed Conditions provision of a construction contract by proof of the existence of conditions materially differing from what might reasonably have been inferred to exist from the data furnished bidders. The bidder may rely on this data and the inferences reasonably supported thereby despite contractual language disclaiming responsibility for reliance on such data and affirmatively allocating the responsibility to the bidder to determine conditions for himself as best he can and account for them and any uncertainty in his bid price. The Court of Claims theory on the latter point is that such language is *per se* in conflict with the Changed Conditions provision which must control as a matter of policy. *Woodcrest Construction Co. v. United States,* 408 F. 2d 406 (Ct. Cl., 1968); *Foster Construction C. A. and Williams Brothers Co. v. United States,* 435 F. 2d 873 (Ct. Cl., 1970).

A. Court of Claims Position

The Court of Claims' decisions on which the Court of Appeals' decision rests are the most recent in a long line of similar cases. All of these cases involve a standard federal construction contract provision known as "Article 4" of the Standard United States Government Construction Contract. (App. D, p. 57) Article 4 is the implementing device for carrying out an express federal procurement policy. This policy is to undertake to furnish bidders as much data as is available on each contract and to accept the risk of additional costs due to encountering adverse conditions materially differing

from what is shown by the data furnished or unknown conditions of an unusual nature differing materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for by the contract. The policy objective is to reduce the overall cost of goverment construction by inducing bidders to reduce or eliminate contingency factors for such circumstances in their bids so that on an overall basis the federal government pays only for the actual costs of risks which actually materialize. See 85 *ALR* 2d 211; Kendall, *Changed Conditions as Misrepresentations in Government Construction Contracts*, 35 Geo. Wash. L. Rev. 978 (1966). Contracting agencies of the United States Government are required to use Article 4 in their construction contracts. 41 *C.F.R.* 1-16.901, 23A (4) (1966); Standard Form 23A (June, 1964, Ed.)

In the Court of Claim's decisions in such cases, the determinative factor is not the language of the contract but the execution of the government policy. The extent to which the Court of Claims weighs policy over contractual language is exemplified by the following:

> "The purpose of the changed conditions clause Article 4 is thus to take at least some of the gamble on subsurfaced conditions out of bidding. Bidders need not weigh the cost and ease of making their own borings against the risk of encountering an adverse subsurface and they need not consider how large a contingency should be added to the bid to cover the risk. They will have no windfalls and no disasters. The government benefits from more accurate bidding without inflation for risks which may not eventually. * * *
>
> All this is long standing deliberately adopted procurement policy expressed in the standard mandatory changed conditions clause and enforced by the Court and administrative authorities on many occasions. * * *

> A faithful execution of the policy requires that the promise in the changed conditions clause not be frustrated by an expansive concept of the duty of bidders to investigate the site. * * *
>
> The changed conditions clause 'makes it clear that bidders are to compute their bids not on the basis of their own pre-award surveys or investigations, but upon the basis of what is indicated and shown in the specifications and on the drawings.' Citing A.S. Horner Construction Co. 59-2 B.C.A. 10-577." *Foster Construction C.A. and Williams Brothers Co. v. United States*, 435 F. 2d 873 (Ct. Cl., 1970).

The impact of the execution of this policy on Court of Claims rules of decisions is:

> "The causes of erroneous indication in the contract—whether simple error, negligence, or other—are no longer important and 'indication' may be proven more over by inferences and implications which need not meet the test for 'misrepresentation' or 'representation', concepts which have a long common law history associated with fraud, and thus ending the need to prove government fault and limiting the issues to the indications in the contract, a matter of law for decision for the court. The changed conditions clause eliminates the factual elements of misrepresentation and any need to pose a burden on the plaintiff to prove those elements. * * *
>
> The first category of changed conditions in the changed conditions clause refers to conditions materially different from those 'indicated in the contract'. * * *
>
> For this part of the changed conditions clause to apply, it is not necessary that the 'indications' in the contract be explicit or specific; all that is required is that there is enough of an indication on the face of the contract document for a bidder not to expect 'subsurface or latent physical conditions at the site differing materially from those indicated

> in this contract.'" *Foster Construction C.A. and Williams Brothers Co. v. United States,* 435 F. 2d 873 (Ct. Cl., 1970).

By adopting the Court of Claims' rules of decision, the Court of Appeals in this case has in effect imposed the underlying policy on non-federal contracting units in the Seventh Circuit.

B. Common Law Position

In direct contrast is a body of law developed by decisions of this Court and the Supreme Court of Wisconsin. Both Courts have concluded that such situations are governed by general principles of contract, fraud and misrepresentation and that it makes no difference that the guilty party is a governmental body. *Hollerback v. United States,* 233 U.S. 165; *Thompson-Abbott Construction Co. v. Wausau* (1960), 9 Wis. 2d 225, 100 N.W. 2d 921.

On the basis of the common law decisions, fraud or misrepresentation (either overt or covert) are necessary elements of proof to permit a court to depart from the normal rules of construction and disregard "exculpatory" language. Absent such elements, qualifying language or site investigation requirements are as effective as the price and description of the work to be done. The Court of Appeals' holding was that unambiguous contractual language which disclaimed guarantee of the test boring data, which warned them of its unreliability and which instructed bidders to predetermine conditions by their own methods and account for their contemplations in their bid price was legally ineffective. This ruling together with the equation of paragraph 20 is outcome determinative.

There is no dispute that the test borings furnished were taken at points some distance from the actual construction site for safety reasons. The contract disclaimed guarantee of the accuracy of this data as an indication of the actual site conditions, affirmatively stated the Commission's anticipation that conditions between the points tested would vary from those encountered by the test borings, and allocated the risk of predetermining subsurface conditions to the contractor to account for in his bid price. (App. C, pp. 52-56)

So called "exculpatory language" may be disregarded if the contracting unit affirmatively asserts erroneous or misleading data while concealing superior relevant data. *Atlantic Dredging Co. v. United States,* 253 U.S. 1; *Christie v. United States,* 237 U.S. 234; *Spearin v. United States,* 248 U.S. 132. However, if the information is all that is available and is honestly furnished for informational purposes only or if there is no concealment of superior information, contractual language qualifying the information and allocating the risk of the lack of complete information to the contractor is effective to preclude such liability. *Day v. United States,* 245 U.S. 159; *MacArthur Bros. v. United States,* 258 U.S. 6; see also 76 *ALR* 273.

The Wisconsin rule is that a construction which gives effect to every word of a written agreement is preferable to one which renders language meaningless. *Nelson v. Boos* (1959), 7 Wis. 2d 393, 96 N.W. 2d 813, 817. When a contract is capable of reasonable construction, extrinsic sources should not be looked to to determine intent. *Barrows v. Leath & Co.* (1951), 258 Wis. 154, 44 N.W. 2d 918.

The Court of Appeals also seized upon a statement preceding the "exculpatory language" to the effect that the

test borings were taken to "determine the condition of the ground likely to be encountered" (App. C, p. 52). The Court of Appeals ignored the facts that it was very clear that this purpose was for the Commission's use in designing the structure, not for telling bidders what to expect as site conditions, and that the Commission contractually protected itself against the possibility of adverse conditions frustrating its design by the Changed Conditions provision used.

A cardinal rule of construction prohibits severance of a sentence or clause from the rest of the agreement for the purpose of arriving at a result different from that which is made manifest by the agreement taken as a whole. *Worth v. Kelley Co.* (1964), 22 Wis. 2d 318, 126 N.W. 2d 75, 78.

C. Analysis of Changed Conditions Provision

It is readily apparent that this aspect of the Court of Appeals' decision also came from the Court of Appeals' reliance on the Court of Claims' decisions dealing with Article 4. Because of some similarity in language, the Court of Appeals read the Changed Conditions Provision of this contract as though it were Article 4. That it is not can be clearly determined by comparison.

Both Article 4 and our paragraph 20 contain the condition precedent that the contractor encounter conditions materially different from those shown on the drawings or indicated in the specifications. Our changed conditions clause does not apply to "unknown conditions . . ." which Article 4 does. However, it is the variance in the remaining language that is critical. Article 4 and our paragraph 20 both require that the contractor immediately report such conditions when they are en-

countered. Article 4 then requires the contracting officer to investigate and confirm the existence of a material difference and after doing so to modify the contract to provide for the prescribed price adjustment due to such conditions. Our paragraph 20 requires the engineer to investigate and to make such changes in the design of the structure as he finds necessary. If a change in the design of the structure is made, he is then to make the prescribed price adjustment resulting from the changes in the design.

The differences in language are due to the fact that the two provisions serve very different purposes. Article 4 is an indemnity provision intended to prevent windfall or disaster for the contractor and thus for the government. Paragraph 20 is not based on indemnity principles at all, as can readily be observed by reading it together with the rest of the contract including the language qualifying the data, warning of probable differing conditions and allocating the risk of predetermination of conditions to the contractor to account for in his bid.

Normally, the words used by the contracting parties are the best indicators of their intention. However, it can be true, as in this case that words not used are also instructive. *North Gate Corp. v. National Foods Stores, Inc.* (1966), 30 Wis. 2d 317, 140 N.W. 2d 744.

The Court of Appeals disregarded these rules of construction and relied only on the similarity between Article 4 and paragraph 20 to justify its application of the Court of Claims' decisions. Giving effect to the differences not only changes the outcome but results in a far more reasonable and consistent construction of the entire contract. This result should have been the Court of Appeals' objective. *McCullough v. Brandt* (1967), 34 Wis. 2d 102, 148 N.W. 2d 718.

The fundamental contemplation of this contract was to build a specified sewer in a specified location for a specified price. Neither the Commission nor the contractor had actual knowledge of site conditions at that location. The Commission did take test borings in the vicinity and designed its sewer considering the test boring data. However, the language in the contract disclaiming any guarantee of the accuracy of the borings as indicators of actual conditions, stating variances in conditions were anticipated, and directing the contractor to determine actual conditions for himself and bid accordingly shows that the Commission itself did not believe the borings to be reliable.

The very essence of a construction contract is that the structure can be built as designed and located using available technology and that when complete will fulfill its intended purpose. It would be grossly imprudent to presume that a design based on scant and questionable soil data would accomplish this and to contract as though it would. It is entirely conceivable that the soil conditions would be such that the sewer could be built as designed but its useful life shortened drastically by inadequate support. Absent paragraph 20, the Commission would have to breach the contract and pay damages or permit the contractor to continue on the inappropriate design unless a new arrangement could be negotiated. Uncertain vicissitudes of tunnel construction demand that the contracting agency protect itself.

Paragraph 20 is intended to provide the Commission protection against such occurrences by contractually permitting it to modify its design as made necessary by actual site conditions and to provide a stipulated method of determining the price for carrying out the design as

changed. This purpose is shown by dissecting the provision. The first type of condition referred to "conditions shown on the drawings" are just exactly that. It refers to any representations of actual site conditions on the drawings; not conditions found elsewhere. The second type of condition referred to, "indicated by the specifications," means conditions such that the structure described by the specifications can be built to perform its intended purpose using available technology. When the contractor encounters such conditions, he must report before disturbing them and permit the engineer time to investigate the impact of such conditions on the design. The engineer must judge whether the design must be changed in response to the changed conditions or not. If it must be, the contractor must await the changed design and the price is adjusted.

In the present case, no site conditions were shown on the drawings. All that was shown on the drawings were conditions encountered by the test borings taken at points off the site. This being so, there is reason why the boring data should have been qualified and bidders effectively warned of the anticipation of variances from the conditions encountered by the test borings. There is no reason why the duty could not have been allocated to the contractor to account for his predetermination of actual conditions in his bid price and be held contractually to his judgment.

The second type of conditions, those which would frustrate the design, are not at issue in this case. The sewer was completed according to the contract design.

The contractor's sole complaint is that actual conditions required a more expensive method of construction than he contemplated in his bid price. Construction

methods were not specified in the contract, thus selection of methods for performance of the contract was the contractor's responsibility.

The Court of Appeals also compared paragraph 20 with paragraph 19, the Change Order provision, and concluded that unless paragraph 20 was intended to be an indemnity provision similar to Article 4 of the federal contract, the two were duplicative. This was clear error.

The Change Order provision is common to most construction contracts. It simply permits the owner to make discretionary changes in the design and provides a predetermined method of establishing the price for the changes. While its exercise is purely discretionary, it is limited as to the type and the magnitude of the changes which can be made. On its face paragraph 19, the Change Order provision of this contract, states that such changes may not exceed the "general scope" of the contract. (App. C, p. 54) This is defined in the contract as the specified sewer in the specified place.

Wisconsin Law holds that while Change Order provisions do not violate the competitive bidding statute *per se*, in order to be legal the changes must be made pursuant to such a contractual provision, may not substantially change the character of the work, nor unreasonably increase its cost. *Blum v. City of Hillsboro* (1971), 49 Wis. 2d 666, 183 N.W. 2d 47; *First Savings & Trust Co. v. Milwaukee County* (1914), 158 Wis. 207, 148 N.W. 22.

The Changed Conditions provision is similar only to the extent that the predetermined method of computing price modification is identical. Its exercise is limited

to situations in which actual conditions are bound to materially differ from site conditions shown on the drawings or indicated by the specifications. The scope of the design changes that may be made under this provision is limited only to what the engineer finds necessary to obtain the necessary result, in which instance he is subject to the usual duty of reason required of public officials. Thus, under the Changed Conditions provision, the character of the work can be ordered changed and cost increases limited only by what is necessary under the circumstances. This approach appears to be permissible under the competitive bidding statutes because its application is limited to circumstances in which it is essential to fulfill the owner's purpose. See 135 *ALR* 1266; 53 *ALR* 2d 515; 1 *ALR* 1295.

The Fattore Company made this argument to the District Court that paragraph 20 was operatively identical to the standard federal provision Article 4 and thus the underlying policy was identical and the Court of Claims' decisions were determinative. There was, however, absolutely no evidence to this effect. The District Court correctly limits its consideration to the language of the contract and on the principles discussed previously held that:

> 1. There was no fraud or misrepresentation, thus the language contemplating conditions differing from what was encountered by the test borings and allocating the duty to predetermine actual conditions and account for the risk to the contractor was fully effective. (App. B, p. 42-46)
>
> 2. That the test boring data, although shown on the drawings, did not purport to show actual site conditions. The locations at which the test borings were made were shown on the drawings and a test boring is positive evidence only of conditions en-

countered by the drill in making the bore. Since no design changes were necessary to complete the sewer, the contractor was not entitled to additional compensation under paragraph 20 because none of the condition precedent had materialized. (App. B, pp. 48-50)

The District Court found no conflict between the "exculpatory language" and paragraph 20 and gave both proper force and effect. The manner in which the Appellate Court reached a decision in this case could only have been more glaring error if instead of looking to Court of Claims' decision, they had, for example, resorted to decisions of a Mexican Court dealing with a totally Mexican contract situation to determine interpretation of an American contract and the rules of law applicable thereto. The resulting rationale may sound logical but it has the fatal flaw of being based on inapplicable or false premises, i.e., Article 4 of a United States Government contract is as a matter of law incorporated into any contract having a "Changed Conditions" clause assuming any similarity, at all, in the language employed and regardless of parties involved. In fact, as far as disregarding qualifying language and affirmative warnings of dangers inherent in the data furnished, this decision may well not be in accord even with the Court of Claims. *Jefferson Construction Co. v. United States*, 364 F. 2d 420, 423 (Ct. Cl., 1960); *W.P.C. Enterprises, Inc. v. United States*, 323 F. 2d 874, 876 (Ct. Cl., 1963).

2. The Decision of the Court of Appeals is in Conflict With the Decisions of Other Courts of Appeals on the Same Subject Matter.

A. Eighth Circuit

The Eighth Circuit Court of Appeals recently decided a case requiring determination of the legal effect of test boring data which did not accurately predict conditions actually encountered in a construction project. *Maurice Mandel, Inc. v. United States*, 424 F. 2d 1252 (1970).

The government contracted with the plaintiff for construction and lease-back of a building. The government procured test borings at the site from a private soil testing firm and furnished the results to bidders. They disclosed water at 8½ to 13 feet below the surface but the contractor encountered springs at 2½ to 3 feet below surface and had to install drain tiles to protect the work. As in the present case, there was no question that the boring logs furnished bidders accurately stated the results of the test borings. The borings did not show the trouble because there was none at the points tested by the borings. The contract disclaimed any warranty that the test borings were representative of actual conditions and the bid document stated:

> "The bidder shall examine the site and be thoroughly acquainted with the conditions thereon. The lessor shall be responsible for site conditions including subsoil characteristics, * * *" pp. 1256

The Court extensively discussed the common law decisions of this Court and other decisions in accord. As to soil borings data in general, it stated:

> "Soil borings are capable of disclosing only actual characteristics of the subsurface materials confined within the boring cylinder. Experience teaches that

soil conditions within a reasonable area surrounding the bore are likely to possess characteristics substantially like the sample within the bore. See *Morrison-Knudson Co. v. United States,* 345 F. 2d 535, 541, 170 Ct. Cl. 712 (1965), but such sampling procedures may fail to accurately demonstrate overall area soil conditions. See *T.F. Scholes, Inc. v. United States,* 357 F. 2d 963, 174 Ct. Cl. 1215 (1966); *Fehlhaber Corp. v. United States,* 151 F. Supp. 817, 138 Ct. Cl. 571; Cert. Den. 355 U.S. 877. . ." * * *

"Moreover, the government concealed no relevant information in failing to advise bidders that the soil testing company, while assuming the tests to be representative ones, declined to warrant soil conditions at the construction site. Such disclaimer statement merely reiterates the obvious risk of some error which may be inherent in sampling soil through boring."

This decision is in accord with the common law cases to the effect that the information furnished must be furnished in a sufficiently positive manner to constitute an expressed or implied representation to permit such language to be held ineffective. Lacking such representation contractual language disclaiming liability and allocating risk to the contractor is effective as a matter of law. Much of the District Court's decision in our present case is substantially similar to that of the Eighth Circuit Court of Appeals in *Mandel.*

The Eighth Circuit is thus in direct conflict with the Court of Claims' position followed by the Seventh Circuit in this case that the nature of the test boring data is such that bidders are entitled to particular protection in relying on it. *Foster Construction C.A. and Williams Brothers Co. v. United States,* 435 F. 2d 873 (Ct. Cl., 1970); *United Contractors v. United States,* 368 F.

2d 585 (Ct. Cl., 1966); *Woodcrest Construction Co. v. United States,* 408 F. 2d 406 (Ct. Cl., 1968); Cert. Den. 398 U.S. 958.

B. Ninth Circuit

A result similar to that of the Eighth Circuit in *Mandel,* although on dissimilar facts; was rendered by the Ninth Circuit Court of Appeals in *United States v. Hathaway,* 242 F. 2d 897 (1957). That case was an action by the government for damages for nonperformance of a contract to remove and salvage a number of steel lock gates from a navigation project. The government furnished plans and charts showing working conditions at the site, and in the contract stated that the information was the best available but disclaimed any responsibility for its accuracy. Neither party knew that a lower set of gates was sprung which coupled with the known depth of the water and accumulated silt and debris made the project economically unfeasible and too dangerous for diving operations. The government was permitted recovery for the contractor's refusal to perform on these grounds:

> "As stated in *Restatement of Contracts,* Sec. 288, Comment B: Since it is possible for a party to a contract to assume the risk of every chance occurrence, a fair interpretation of the contract may indicate an intention to be bound to perform or to pay damages for nonperformance, whatever contingencies may occur." p. 900

The Court went on to state that if the contractor had any doubts about the information furnished and the fact that government disclaimed liability for it, he should not have bid.

In common practice, the invitation for bids and the documents furnished bidders contain the full contract which will be entered into with the winning bidder. The contractor knows in advance of bidding what he is getting into. If he spots any ambiguity, he has an opportunity to seek clarification from the contracting unit and has an obligation to do so, particularly when a specification provision affirmatively warns him of possible flaws in the plan data. *Hathaway*, supra; see also *Jefferson Construction Co. v. United States*, 364 F. 2d 420, 423 (Ct. Cl., 1960); *W.P.C. Enterprises, Inc. v. United States*, 323 F. 2d 874, 876 (Ct. Cl., 1963) for Court of Claims' decisions in accord. In a non-Article 4 situation, he has the additional alternative of accounting for any lack of information by a contingency factor in his bid. In such cases, there is no reason for judicial protection against incurring increased costs beyond the well established concepts of affirmative misrepresentation or concealment of relevant data. Lacking those elements, the procedure permits a knowledgeable and prudent bidder to take care of himself. He should not be permitted a second kick at the cat for failing to do so, particularly when the Instructions to Bidders tell him to.

In the present case, the drawings showed the results and locations of the test borings accurately. The documents furnished specifically disclaimed responsibility for the representativeness of the boring data and affirmatively stated that conditions other than those found by the bores should be anticipated on the actual work site. There was no superiority of information and no better information could safely be obtained. The test boring logs were not shown on the drawings as conditions at the actual site. Neither party knew what the actual site conditions would be. Under these circumstances, the Com-

mission was perfectly justified in doing what it did; calling the bidders' attention to the potential risk that conditions would differ from those found by the test borings, instructing bidders to account for that risk in their bid prices (the contract documents show that, excluding conditions such as would frustrate the design, this is the only method of accounting for it), and to rely on competition between bidders to control the magnitude of contingency and profit factors included in the bids.

The decisions of the Eighth and Ninth Circuits giving full effect to such contractual language categorized by the Seventh Circuit as "exculpatory" absent misrepresentation or concealment of information are in accord with Wisconsin law and the prior common law decisions of this Court. The decision by the Seventh Circuit in this case is in direct conflict. The decision of the District Court is in complete accord with these jurisdictions. There is nothing in these decisions to indicate that there is any legal magic in a Changed Conditions provision. Outside of the Court of Claims' situation, which is clearly unique, such a provision is merely a portion of an entire agreement, all of which must be given effect.

3. The Questions Presented by This Petition Are of Great Importance in the General Field of Public Works Contracting Law.

Public Works contract law is of tremendous importance. Technology has advanced greatly in recent years. Local governments are more and more entering into contracts for facilities which few even dreamed might exist not long ago. Pollution abatement, urban renewal, housing and transportation are making heavy demands on construction technology and thus on the draftsman who

must prepare the written contracts that form the basis of every such project. In the case of *First Savings & Trust Co. v. Milwaukee County*, 158 Wis. 207, 148 N. W. 22 (1914), the Supreme Court of Wisconsin recognized that engineering was an art rather than an exact science in the following statement:

> "But neither architects nor engineers have arrived at that stage of perfection where they can design great structures and unerringly provide for every detail of their constructions. * * *"

Even today lawyers and judges who become involved in public works construction cases have no cause to take issue with that statement. The construction contract is the legal vehicle for implementing the engineers' design of a facility intended to satisfy particular public needs. Billions of dollars change hands every year on the basis of such instruments.

It has been some time since this Court last ruled on such questions of law. In recent years, the bulk of litigation in this area has taken place in the Court of Claims on Article 4 cases. For this reason and because of the scarcity of modern common law precedent, it is convenient for a court faced with applying rules of contract law to difficult fact situations to use these cases largely because of the nature of their fact situations. Yet, this approach disregards the prior common law principles of legal analysis set forth by this Court and other courts for dealing with such situations. Reaffirmation and refinement of the well established principles of common law laid down by this Court some years prior would be highly desirable. The Court of Claims' decisions involve a unique situation and thus are not accurate sources for general rules of decision.

Furthermore, a conflict now exists between the Seventh Circuit and the Eighth and Ninth Circuits largely because of the existence of the Court of Claims' cases referred to previously. The time is appropriate for this Court to clarify the conflict and this case is an excellent vehicle for doing so. There is no reason why a contracting unit faced with a large project and little information should not be able to allocate the risk of adverse conditions to the contractor and rely on competition among bidders to control costs. The Seventh Circuit Court of Appeals has precluded this approach.

The states and their political subdivisions are clearly entitled to develop their own policies on allocation of contractual risk unless, of course, there were some particular federal procurement policies required by a grant administering agency. This would be an exceptional situation. The federal courts in deciding diversity cases are bound to use any applicable state or local law implementing such policy by 28 U.S.C. 1652 as construed in *Erie R.R. v. Tompkins,* 304 U.S. 64. In the present case, the Court of Appeals overlooked this requirement and chose to apply Court of Claims' rules of decision based upon federal policy.

Under these circumstances and in light of the competitive bidding procedures commonly used, contractors are in need of no judicial protection on predetermination of site conditions other than the principles of active or passive misrepresentation establish by this Court. Absent these elements, the parties should be free to govern their relationship by contract.

The lower federal courts now need direction to establish limits on the search for precedent. The interests of justice as between these particular parties require it in the present case.

CONCLUSION

The decision below is clearly erroneous and the matter sufficiently important to warrant this Court's attention. For the reasons set forth above, it is respectfully submitted that this petition for certiorari should be granted and the decision of the Court below summarily reversed.

Respectfully submitted,

SCHROEDER, GEDLEN, RIESTER & MOERKE
Ewald L. Moerke, Jr.
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Attorneys for Petitioner
METROPOLITAN SEWERAGE COMMISSION
OF THE COUNTY OF MILWAUKEE

APPENDIX A

IN THE

United States Court of Appeals

FOR THE SEVENTH CIRCUIT

SEPTEMBER TERM, 1971 — SEPTEMBER SESSION, 1971

No. 71-1350

FATTORE COMPANY, INC.,
Plaintiff-Appellant,

v.

METROPOLITAN SEWERAGE COMMISSION of The County of Milwaukee,
Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Wisconsin.

Civil No. 69 C 420

HON. MYRON L. GORDON, *Judge.*

DECEMBER 15, 1971

Before SWYGERT, *Chief Judge,* CASTLE, *Senior Circuit Judge,* and FAIRCHILD, *Circuit Judge.*

CASTLE, *Senior Circuit Judge.* This diversity action was brought by the plaintiff-appellant, Fattore Company, Inc., a construction contractor to recover additional compensation for work done on a sewer construction contract awarded plaintiff by the defendant-appellee, Metropolitan Sewerage Commission of the County of Milwaukee. The issue of liability was separated from the issue of damages and tried to the court without a jury. The District Court filed a memorandum decision incorporating its findings of fact and conclusions

of law, and entered judgment in favor of the defendant dismissing plaintiff's action on the merits and awarding costs to the defendant. The plaintiff appealed.

The contract involved was for the construction of approximately 6,600 lineal feet of 12 foot diameter monolithic sewer approximately 100 feet below ground level. Plaintiff's complaint seeks recovery of additional costs incurred in the performance of the contract. It alleges that these costs were incurred because the ground conditions encountered in the tunneling materially differed from the conditions shown by test borings furnished to bidders by the defendant. The complaint predicates a right to such recovery on a "changed conditions" clause of the contract, and also on the independent grounds of misrepresentation and breach of warranty. Defendant's answer, inter alia, denies the applicability of the "changed conditions" clause and interposes an affirmative defense based on alleged acceptance of "final payment" by the plaintiff. Defendant asserts that under a provision of the contract such acceptance operated as a release barring the plaintiff's claim.

From our review of the record, considered from the aspect of the respective contentions advanced on appeal by each of the parties, we are satisfied that the District Court's findings of fact and conclusions of law, insofar as they bear upon and reject both misrepresentation and breach of warranty as independent grounds for recovery by the plaintiff, are, respectively, neither clearly erroneous nor the result of the application of incorrect legal criteria.[1] We therefore turn to an examination

[1] *See McNulty, Inc. v. Village of Newport* (Minn. 1971), 187 N.W. 2d 616, where the action was based solely on alleged "misrepresentation" — not on a "changed conditions" clause.

and consideration of the court's findings and conclusions as they relate to the court's ultimate holdings that the "changed conditions" clause of the contract affords no basis for recovery by the plaintiff and that, in any event, an acceptance of "final payment" by plaintiff bars suit on its claim. As a preface to such examination and consideration the pertinent facts disclosed by the record are summarized as follows.

Prior to the bidding, the plaintiff and other bidders were furnished with copies of the proposed contract documents, including a "Plan and Profile" which indicated among other things, the route of the sewer, the depth of the work, the logs of seven test borings taken at 1,000 foot intervals at points offset varying distances from the actual planned location of the sewer, and the locations of the points at which the test borings were made. The reason the test borings were offset from the line of the sewer was so that the holes would not intersect or be too close to the actual tunnel so as to alleviate the risk of blowouts in the event the contractor had to pressurize the tunnel with compressed air during the work—a common practice to assist in keeping water out. The "Instructions to Bidders", one of the contract documents, recited that the defendant had made test borings to determine the character of the ground "likely to be encountered", that such information was available to the bidders, but that the defendant "did not guarantee that . . . the character of the ground is uniform between borings" and its engineers anticipated that "there will be variations in the character of the ground between the test borings". It was further stated that each bidder was expected to ascertain the character of the soil through which the work was to be done.

The defendant's test borings disclosed clay, coarse sand and gravel to be the character of the soil down to the 100 foot underground level—the floor of the proposed sewer tunnel. In reliance on the borings furnished by the defendant, the plaintiff's bid was predicated on the use of the shield method of tunneling and the utilization of deep wells for any necessary dewatering. However, the actual underground conditions encountered in the performance of the work differed materially from those indicated by the defendant's test borings. Solid rock and mixed face were encountered at the sewer grade throughout the first 496 feet of the tunnel. Therefore, the shield method of tunneling and constructing the concrete sewer had to be abandoned, and once abandoned, it is impossible to again begin using the shield when conditions permit. The plaintiff was unable to use the shield and as a result the tunneling costs were substantially increased. In addition, the presence of silt and fine sand, as well as bedrock at or immediately below the sewer grade, frustrated the use of deep wells and dewatering costs increased. The attention of defendant's Engineer was immediately called to the conditions encountered, and a request for additional compensation made, before the work proceeded.

Paragraph 20 of Section I of the contract's General Conditions provides:

> "20 *Changed Conditions.* Should the Contractor encounter, or the Sewerage Commission discover during the progress of the work, subsurface and (or) latent conditions at the site materially differing from those shown on the drawings or indicated in the specifications, the attention of the Engineer shall be called immediately to such conditions before they are disturbed. The Engineer shall thereupon promptly investigate the conditions, and if he finds that they

materially differ from those shown on the drawings, or indicated in the specifications, he shall at once make such changes in the drawings and (or) specifications as he may find necessary and any increase or decrease of cost and (or) difference in time resulting from such changes shall be adjusted as provided in Paragraph 19 of this contract."

Paragraph 19, to which Para. 20 makes reference, authorizes the defendant's Engineer to at any time make changes in the contract specifications by written order, and provides that if such changes cause an increase or decrease in the amount due under the contract "an equitable adjustment shall be made and the contract shall be modified in writing accordingly".

Work on the tunneling commenced May 11, 1961. After encountering the underground conditions which materially differed from those disclosed by the test borings, the plaintiff on May 17, 1961 and again on June 13, 1961 made written requests to the defendant's Chief Engineer for a price adjustment because of the increased costs of doing the work. When work on the contract was completed and the job accepted by the defendant in January of 1964, no action had yet been taken on the plaintiff's request for an adjustment.

The contract required periodic monthly payments on the basis of duly certified approved estimates of the work performed during the preceding calendar month by the contractor less a percentage of the amount of the estimate (10% when the amount of the estimate is $100,000 or more)[2] to be retained by the defendant until final completion and acceptance of the work covered by the contract. Article 7 of the contract provides that the accept-

[2]15% where the estimate amount is less than $100,000.

ance by the contractor of the final payment by the owner "shall be and shall operate as a release to" the defendant "from all claims and liabilities to the contractor for anything done or furnished for, or relating to the work, or for any act, neglect, fault or default of the owner or of any person relating to or affecting the work".

On February 25, 1964, prior to the payment for work done following the preceding monthly estimate (Estimate No. 37) and payment, plaintiff made a request by letter to the defendant that the retained percentage on the contract being withheld by the defendant be reduced in amount to $10,000 and advised that:

> "Payment by the Sewerage Commission pursuant to the foregoing request and acceptance of such payment by Fattore Company Inc. is not to be construed as acceptance of final payment under the provisions of Article 7 of the Contract between the Sewerage Commission and Fattore Company Inc."

Subsequently, the defendant made a determination that $17,800 represented liquidated damages for which plaintiff was liable for failure to complete the work within the time specified in the contract, and on May 6, 1964, plaintiff wrote the defendant that plaintiff acceded to this deduction, but that:

> "It is, however, expressly understood and agreed that Fattore Co., Inc. does not waive its right to present a claim for extra payment on its contract because of unusual and unexpected conditions encountered on the job. Rather, Fattore Co., Inc. expressly reserves to itself the right to present such a claim to the Commission and to pursue its legal remedies."

On May 20, 1964, the defendant's Chief Engineer presented "Estimate No. 38", which is captioned,

"MONTHLY ESTIMATE

For the period Ending May 20, 1964"

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to defendant and recommended payment thereof upon the condition that the check for the amount shown due on the estimate ($273,774.15) be not released until the plaintiff furnished certain releases from material suppliers and subcontractors.

The Chief Engineer's recommendation was accompanied by a communication from defendant's acting legal advisor which advised that a letter received May 5, 1964, from plaintiff's attorneys:

> ". . . outlines a course of procedure for the release of a substantial portion of the 15% retained moneys. . . ."

Defendant's legal advisor after noting, among other things that plaintiff disputed an amount ($4,117.70) claimed to be due from the plaintiff to the Building Trades United Pension Trust Fund, and advising that such amount be withheld, recommended "that the procedure as set forth in the letter of May 5, 1964, from the attorneys for the Fattore Company be approved" and concluded with the following statement:

> "There is some intimation that the Fattore Company will file a claim against the Metropolitan Sewerage Commission of Milwaukee County for additional compensation because of conditions encountered on this job not anticipated when the bid was submitted. This is not part of this transaction, and, consequently, no mention should be made of this matter in the present proceedings for completing payment on this contract."

Following the presentation of Estimate No. 38, the recommendations of its Chief Engineer, and the advisory communication of its legal advisor, the defendant adopted a resolution reciting that the defendant was holding the sum of $277,891.85, which represented the retained percentage less the $17,800 in liquidated damages; directing the retention of $4,117.70 until the dispute concerning its payment has been resolved; and authorizing delivery of defendant's check in the amount of $273,774.15 to the plaintiff upon the latter's furnishing the releases from material suppliers and subcontractors. Accordingly, payment of the $273,774.15 "amount due on estimate" was made to plaintiff on June 18, 1964, and plaintiff acknowledged on the face of Estimate No. 38 that it "Received payment in the above amount." Estimate No. 38 is not described on its face as being a "Final Estimate" nor is the "amount due on estimate" characterized in any manner as representing the "final payment" on the contract. In this respect, Estimate No. 38 differs from the closing estimates made and used by the defendant in connection with four other contracts covering work on other portions of its sewer project. In each of these other cases the estimate was designated on its face as being "FINAL"; the Chief Engineer certified thereon that he "approve[s] this Final Estimate"; and the contractor acknowledges that it "accept[s] this Final Estimate as payment in full for Contract No. [number]".

The District Court found and concluded that even though plaintiff found the subsurface conditions different from those indicated by the test borings shown on the "Plan and Profile", and the conditions actually encountered increased the plaintiff's costs, the plaintiff was not entitled to additional compensation under the contract. In this connection the court points to the exculpa-

tory language contained in the "Instructions to Bidders" with respect to the test borings furnished by the defendant, and the caveat therein to the effect that each bidder was expected to ascertain the character of the soil through which the work is to be done, and concludes that the plaintiff was not entitled to rely upon the defendant's test borings in making its bid. In addition, the court reads Paragraph 20, Section 1 of the contract's General Conditions, quoted supra, as being limited in its application to a situation where the defendant's Engineer determines that the changed subsurface conditions encountered necessitate a revision in the drawings and (or) specifications, and that no such changes were made by defendant's Engineer in the case at bar. In our opinion the District Court clearly erred on both scores.

The defendant's test borings were incorporated as a part of the contract documents and specifications. In this respect the contract set forth:

> "Specifications
>
> * * *
>
> 4. Borings. The Metropolitan Sewerage Commission of the County of Milwaukee has made seven test borings along the route of that portion of the sewer in this contract. The logs and locations of these borings are shown on the drawings. . . ."

The sample borings were made available to the bidders, and are described in the contract documents as having been made "to determine the character of the ground likely to be encountered". Their disclosures with respect to subsurface conditions were thus "indicated in the specifications" as the conditions likely to be encountered by the successful bidder at the tunneling level. Certainly, the subsurface conditions actually encountered in the prosecution of the work "materially differ[ed] from

those shown on the drawings or indicated in the specifications" within the purview of that language as used in Paragraph 20. Moreover, in the presence of a "Changed Conditions" clause such as Paragraph 20, broad exculpatory clauses do not preclude the contractor-bidder from relying upon the existence of subsurface conditions of the nature indicated by the contract specifications. In this connection the observations made in *Woodcrest Construction Company v. United States,* U.S. Ct. of Claims, 408 F. 2d 406, 410 are apposite:

> ". . . Here, although there is no statement which can be made binding upon the Government, there was in effect a description of the site, upon which plaintiff had a right to rely, and by which it was misled. Nor does the exculpatory clause in the instant case absolve the Government, since: . . . broad exculpatory clauses . . . cannot be given their full literal reach, and 'do not relieve the defendant of liability for changed conditions as the broad language thereof would seem to indicate.' *Fehlhaber Corp. v. U.S.*, 151 F. Supp. 817, 825, 138 Ct. Cl. 571, 584 (1957), cert. denied; 355 U.S. 877, 78 S. Ct. 141, 2 L. Ed. 2d 108. As *Fehlhaber* said, general portions of the specifications should not lightly be read to override the Changed Conditions clause Ibid. *United Contractors, et al. v. U.S.* 368 F. 2d 585, 598, 177 Ct. Cl. 151, 165-166 (1966)."

See also: *Foster Construction C. A. and Williams Bros. Co. v. United States,* (Ct. Cl. 1970), 435 F. 2d 873, 875.

As hertofore pointed out, Paragraph 19 authorizes the Engineer to "at any time . . . make changes in the drawings and/or specifications of this contract and within the general scope thereof". This is so irrespective of whether or not subsurface conditions are encountered which materially differ from those indicated in the speci-

fications or shown on the drawings. The District Court's interpretation of Paragraph 20 is to the effect that it conditionally authorizes the Engineer to make changes he has the unconditional authority to make under Paragraph 19. To so read Paragraph 20 would be contrary to the fundamental doctrine of construction recognized in *Nelson v. Boos,* 7 Wis. 2d 393, 399, 96 N.W. 2d 813, 817, where it is stated:

> "A construction which renders meaningless a provision expressed in the contract or results in surplusage should be avoided if possible."

Properly applied these two contractual provisions give the defendant an option under circumstances such as are here involved. The defendant may under Paragraph 19 revise its plans and specifications so as to divert the course of the sewer in order to avoid the subsurface condition encountered or otherwise change the design so as to control the costs in the light of the condition encountered. But if the defendant elects, as it did in the instant case, to have the contractor continue the work through the subsurface conditions actually encountered, then the "Changed Conditions" clause, Paragraph 20, controls and entitles the contractor to an equitable adjustment of compensation in event the changed conditions encountered result in an increase in its costs. We reject, as erroneous, the District Court's holding to the effect that Paragraph 20 requires, as a condition precedent to the existence of a contractual right to an equitable adjustment in compensation to cover an increase in costs resulting from the encountering of subsurface conditions materially differing from those indicated in the specifications, that the defendant's Engineer make a revision of the plans and specifications. Under the language of Paragraph 20 the Engineer is to make

only "such changes in the drawings and (or) specifications as he may find necessary". If none are "necessary", then none are to be made. And, if Paragraph 20 is to be read as requiring that the Engineer make appropriate notations or entries on the drawings to reflect the nature and extent of the conditions encountered, then his duty to so do must be regarded as mandatory. Surely, the parties to the contract cannot be assumed to have intended that the contractor's right to additional compensation under Paragraph 20 be subject to the whim of the defendant's Engineer — or that a default in duty on the part of this agent of the defendant can deprive the contractor of its rights.

On this phase of the appeal we conclude that the District Court erred in its holding that the "changed conditions" clause of the contract affords no basis for recovery by the plaintiff.

With respect to the defendant's affirmative defense of an acceptance of "final payment" which constituted a bar to plaintiff's action for additional compensation, the District Court found that the contract price was $2,946,822; that the payment made pursuant to Estimate No. 38 was made following the completion and acceptance of the work; that said estimate shows as the "total value of the work to date" the sum of $2,956,678; shows $2,660,986 as the amount of the payments previously made; contains a computation of certain agreed liquidated damages due defendant; discloses a balance of $273,774.15; and thus constitutes a final accounting.[3] The

[3]The court made further findings concerning the fact that on defendant's worksheet pertaining to Estimate No. 38 the word "final" was pencilled out, and concerning the testimony of plaintiff's president relative to a conversation he stated he had with defendant's Chief Engineer, prior to plaintiff's letter of May 6, 1964, about de-

court found that no substantial evidence had been presented which would warrant a conclusion that the defendant has acceded to a waiver of the final payment clause, and concluded that the check for $273,744.15 accepted by the plaintiff on June 18, 1964, must reasonably be construed to constitute a "final payment" under the contract. The court viewed the plaintiff's letters of February 25 and May 6, 1964, quoted supra, as being but ineffective unilateral efforts of the plaintiff to avoid or nullify Article 7 of the contract, applying the principle that a contract may not be modified without the consent of both of the parties.

In our opinion neither the fact that the contract work had been completed and accepted at the time of the acceptance of the June 18, 1964, payment, the arithmetical computations reflected by Estimate No. 38, the language used in identifying the items appearing in the estimate, nor that the estimate appears to reflect a final accounting, are individually or collectively dispositive of the issue as to whether the $273,774.15 check constituted final payment under the contract. Ordinarily whether or not there has been an acceptance of a final payment depends upon the intentions of the parties. *F. H. McGraw & Co. v. New England Foundation Co.*, 1 Cir., 210 F. 2d 62, 68; *Fredburn Const. Corp. v. City of New York*, (1939) 280 N.Y. 402, 21 N.E. 2d 370.

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fendant withholding a token amount of the retained percentages "so we wouldn't have a misunderstanding because I knew there was a clause about final payment" and the Chief Engineer's assurance that "there was no problem". But the court concluded that there was scant probative value in the worksheet as an admission on defendant's part, the record being barren as to the circumstances attending the striking out of the word "final" or whether such action was authorized, and that plaintiff's president's interpretation of his conversation with the Chief Engineer falls short of constituting a waiver of the defendant's rights under Article 7 of the contract.

Such intent, of course, must be determined on the basis of objective factors considered in the light of the attending circumstances.

It is apparent from the record that after the work had been completed and accepted, but no action had been taken on the plaintiff's claim for additional compensation, plaintiff was concerned that it not accept a payment which would bar its claim under Article 7, the "final payment" clause of the contract. In its February 25, 1964 letter plaintiff requested that it be paid all but $10,000 of the retained percentage, and clearly expressed its intent and position that such a payment "is not to be construed as acceptance of final payment under the provisions of Article 7". The defendant did not proceed to honor that request, and there was nothing at this stage of the matter which indicated that the defendant was receptive to the making of an interim payment which would not be final. Subsequently the defendant asserted its claim for liquidated damages in the amount of $17,800 based on plaintiff's delay in completing the work. The plaintiff agreed to such a deduction but simultaneously gave defendant express notice that plaintiff was not waiving its claim for additional compensaton, and, contemporaneously, through its attorneys, outlined a course of procedure for the release to the plaintiff of only a "substantial portion" of the retained monies — thereby adhering to its earlier position that it had no intention of accepting a final payment which would bar its claim.

It was in this posture of the matter that the defendant took action which evidences its intent with respect to the payment it made on June 18, 1964. On May 20, 1964, the defendant in a formal commission meeting consider-

ed the recommendations made by its legal advisor. These concurred in the report and recommendations presented by defendant's Chief Engineer; made reference to the proposal advanced by plaintiff's attorneys for release of a "substantial portion" of the retained percentage; recommended that such procedure be approved; and pointed out that plaintiff's claim for additional compensation "is not a part of this transaction". And, it was in this context that the defendant adopted a resolution which approved a payment of $273,774.15 to the plaintiff but directed that $4,117.70 (the balance of the retained percentage) be retained "until such time as the dispute concerning the payment thereof [whether plaintiff was to receive this money or owed it to a union pension trust fund] has been resolved." The $273,774.15 was approved for payments on the basis of Estimate No. 38 which bore no formal indicia that it was a "final" estimate. This estimate, unlike those made in connection with the closing estimates on the contracts for other portions of the sewer project, was neither designated as being the "Final" estimate, nor was plaintiff required to acknowledge thereon that it "accept[s] this Final Estimate as payment in full".

It is our conclusion, based on the facts and circumstances disclosed by the record, that the District Court clearly erred in its finding and conclusion that acceptance of the June 18, 1964 payment operates as a bar to plaintiff's action. We are convinced that the record reflects no intention on the part of either the plaintiff or the defendant, at the time Estimate No. 38 was approved and the payment thereunder made, that such payment represented a "final payment" within the meaning of Article 7 of the contract. If the defendant intended otherwise its action in presenting an estimate which, with respect to its being the "final" estimate, was, at

best, ambiguous in character, would under the circumstances here presented border on deceit. But we see no basis for so imputing bad faith to the defendant.

Moreover, the retention of the $4,117.70 to await a resolution of the dispute as to whether plaintiff or the union pension trust fund was to receive it is further evidence that the June 18, 1964 payment was not intended to be the final payment under the contract. A resolution of the dispute in favor of the plaintiff obviously would require a subsequent payment of this $4,117.70 balance of the retained percentage to the plaintiff.

The judgment order appealed from is reversed, and the cause is remanded to the District Court for further proceedings consistent with the holdings made herein.

REVERSED AND REMANDED.

A true copy:
Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

January 10, 1972

Before

Hon. LUTHER M. SWYGERT, Chief Judge

Hon. LATHAM CASTLE, Sr. Circuit Judge

Hon. THOMAS E. FAIRCHILD, Circuit Judge

FATTORE COMPANY, INC.,
Plaintiff-Appellant,

vs.

No. 71-1350
METROPOLITAN SEWERAGE COMMISSION OF THE COUNTY OF MILWAUKEE,
Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Wisconsin.

IT IS ORDERED by the Court that the petition for rehearing filed in the above-entitled cause be, and the same is hereby denied.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

FATTORE COMPANY, INC.,
Plaintiff.

v.

METROPOLITAN SEWERAGE COMMISSION OF THE COUNTY OF MILWAUKEE,
Defendant.

No. 69-C-420

DECISION AND ORDER

This contract action was tried to the court, sitting without a jury. Post-trial briefs were submitted by the parties. The court must determine whether certain increased costs incurred during the construction in question are chargeable to the defendant.

The plaintiff urges that it is entitled to additional compensation under the "changed conditions" clause of the contract and also that it is entitled to recovery under theories of misrepresentation and breach of warranty. The defendant denies these claims and alleges that the plaintiff is barred under the "final payment" provision of the contract.

I. FINAL PAYMENT

The defendant advanced the final payment defense in a motion considered before trial, but the court rejected the motion in order to have an opportunity to hear all

the facts surrounding the transaction. Article 7 of the contract contains the following provision:

> "ARTICLE 7. CONTRACTOR PRECLUDED FROM SUING OWNER — The acceptance by the Contractor of the final payment by the Owner shall be and shall operate as a release to the Owner from all claims and liabilities to the Contractor for anything done or furnished for, or relating to the work, or for any act, neglect, fault or default of the Owner or of any person relating to or affecting the work." (exhibit 22cc)

I find that monthly estimate no. 38 (exhibit 17) constitutes a final statement of the account. It shows that the job was completed and computes the amount due as a balance. The contract required periodic monthly payments; the last payment made by the commission was made following the completion and acceptance of the work. The defendant persuasively urges that exhibit 17 "represents a proper closeout of the contract." It contains a final accounting, showing the amount of the previous payments, a computation of certain liquidated damages (agreed to by Mr. Fattore), and disclosing the balance of $273,744. The check in such amount paid by the defendant to Fattore Company in accordance with the summation in exhibit 17 must reasonably be construed to constitute a "final payment" under the contract.

The contract price was $2,946,822, and exhibit 17 shows as the "total value of work to date" the figure of $2,956,678. Previous payments of $2,660,986 had been made, leaving a final balance (with certain small adjustments which are not in issue) of $273,774, which sum was paid to the plaintiff.

The plaintiff points out that in the defendant's worksheet pertaining to estimate no. 38 (exhibit 18), the

word "final" was pencilled out. The record does not establish who did such striking; its probative value as an admission on the part of the defendant is scant since under Wisconsin law, a principal may not be bound by the admission of an agent unless it appears that the agent had authority to act. Rudzinski v. Warner Theaters, Inc., 16 Wis. 2d 241, 114 N.W. 2d 466 (1962). In the case at bar, we have a word stricken out, but the record is barren as to the circumstances attending such act. We do not know if it was authorized or unauthorized.

The plaintiff also argues that in certain other contracts of this defendant, the word "final" affirmatively appeared in connection with the final payment. In my opinion, the plaintiff's contention that this established the "uniform practice" of the defendant has not been adequately established.

Mr. Fattore testified that he talked with Mr. Leary about withholding "a token amount, so we wouldn't have a misunderstanding because I knew there was a clause about final payment, and he reassured me there was no problem". Although this testimony was not contradicted, Mr. Leary's statement to Mr. Fattore that "there was no problem" falls short, in my opinion, of constituting a waiver of the defendant's rights under Article 7 of the contract. If the defendant is to be charged with having forsaken its protection under the formal contract between the parties, proof thereof should be clearer than that presented by Mr. Fattore's interpretation of the rather broad and precatory expression attributed to Mr. Leary. In addition, it has not been shown that Fattore Company relied on such waiver.

The plaintiff urges that before the acceptance of the June 18, 1964 payment, Mr. Fattore wrote two letters

to the defendant which reserved the plaintiff's right to maintain this lawsuit. The letter of February 25, 1964 provides in part:

> "Payment by the Sewerage Commission pursuant to the foregoing request and acceptance of such payment by Fattore Company Inc. is not to be construed as acceptance of final payment under the provisions of Article 7 of the Contract between the Sewerage Commission and Fattore Company, Inc."

On May 6, 1964, Mr. Fattore wrote another letter to the defendant which reads:

> "It is, however, expressly understood and agreed that Fattore Co., Inc. does not waive its right to present a claim for extra payment on its contract because of unusual and unexpected conditions encountered on the job. Rather, Fattore Co., Inc. expressly reserves to itself the right to present such a claim to the Commission and to pursue its legal remedies."

These two letters clearly recognize that a final payment was being offered and were written in an effort to avoid the consequence of Article 7 of the contract. Under Wisconsin law, however, a contract cannot be modified without the consent of all parties to the contract. Nelsen v. Farmers Mutual Automobile Ins. Co., 4 Wis. 2d 36, 54, 90 N.W. 2d 123 (1958); Jost v. Wolf, 130 Wis. 37, 40, 110 N.W. 232 (1906). Mr. Fattore was aware of the problem concerning the final payment at the time he retained the check. His unilateral effort to relieve his company of the impact of Article 7 does not nullify that provision.

No substantial evidence has been presented in this case which would warrant my concluding that the defendant acceded to a waiver of the final payment clause or consented to the plaintiff's present interpretation of

the June 18, 1964 payment. None of the facts surrounding the transaction was sufficient, in my view, to destroy the last payment's being "final".

The Fattore letters, considered in light of all the circumstances surrounding the present case, persuade me that the plaintiff's disclaimer did not entitle it to retain the check and to avoid, at the same time, the burden of its constituting a final payment. Chandler v. State Highway Board of Georgia, 61 F. 2d 601, 604 (5th Cir. 1932). See also Everlite Mfg. Co. v. Grand Valley Machine & Tool Co., 44 Wis. 2d 404, 413, 171 N.W. 2d 188, 192 (1969).

The defendant having met its burden of proof in establishing its defense of "final payment" under the contract, it should follow that the plaintiff's complaint must be dismissed. However, I believe it desirable for the court to pass upon the other principal contentions advanced in this case.

II. CHANGED CONDITIONS

The Fattore Company claims that it is entitled to recovery because it encountered subsoil conditions which were contrary to those shown by the test borings supplied by the sewerage commission. The contract itself in paragraph 20 of exhibit 22t, provides for changed conditions in the following terms:

> "20. *Changed Conditions.* Should the Contractor encounter, or the Sewerage Commission discover during the progress of the work, subsurface and (or) latent conditions at the site materially differing from those shown on the drawings or indicated in the specifications, the attention of the Engineer shall be called immediately to such conditions before they

> are disturbed. The Engineer shall thereupon promptly investigate the conditions, and if he finds that they materially differ from those shown on the drawings, or indicated in the specifications, he shall at once make such changes in the drawings and (or) specifications as he may find necessary and any increase or decrease of cost and (or) difference in time resulting from such changes shall be adjusted as provided in Paragraph 19 of this contract." (exhibit 22t)

There can be little doubt from the evidence received at the trial that unexpected ground conditions were discovered as the plaintiff pursued its work. The plaintiff urges that it had a right to rely on the borings furnished by the sewerage commission; therefore, it committed itself to working with an open-faced shield. However, it was obliged later to abandon the shield for the balance of the tunnel because of the nature of the ground. The inability to use a shield increased the plaintiff's costs. Those costs were also increased because of the unexpected presence of silt and fine sand, which could not be dewatered as readily as the coarse materials which had been anticipated by the plaintiff.

The defendant issued "instructions to bidders", appearing as exhibit 22f, which include the following:

> *"Instructions to Bidders*
>
> "The Sewerage Commission has, so far as has been possible, located the underground and surface structures which may be encountered in constructing the work embraced in this proposal and has made test borings to determine the character of the ground likely to be encountered. Being public information, any bidder may have access to it, but the Sewerage Commission does not guarantee the correctness or accuracy of such information and does not guarantee that all the underground structures likely to be en-

countered are shown upon the plans, that the location of those shown is accurate, nor that the character of the ground is uniform between borings, in fact, the Engineers anticipate that, during the work, underground structures of which the Sewerage Commission has no record or information will be encountered, and that there will be variations in the character of the ground between the test borings.

"It is expected that each bidder will, prior to submitting his bid, ascertain the character of the soil through which the work is to be done, and obtain such other information as will assist him to make an intelligent bid."

The contract in question, number M-176, was awarded to Fattore Company after competitive bids had been received from various bidders. The following bids were received on the contract:

Fattore Co., Inc.	$2,946,822
Square Construction Co., Inc.	$3,125,840
Traylor Bros., Inc.	$3,225,168
W. J. Lazynski, Inc.	$3,546,042
MacLean Grove & Co., Inc.	$4,417,143

Prior to bidding, the sewerage commission supplied bidders with copies of a "Plan and Profile" which portrayed the results of seven test borings taken along the line of sewer covered by contract M-176.

In my opinion, the plaintiff is not entitled to additional compensation under this contract, even though it found subsurface conditions different from those indicated by the test borings on the "Plan and Profile." Bidders were specifically instructed that the commission did not guarantee the correctness or accuracy of the underground conditions. The instructions also imposed upon

each bidder the duty to "ascertain the character of the soil through which the work is to be done." There is nothing in the evidence which would justify the conclusion that the defendant misrepresented its findings as to the subsoil condition or withheld information in order to obtain lower estimated bids.

In addition, paragraph 20 provided a specific technique to be followed in order to increase the contractual costs. If the plaintiff felt it was entitled to relief under paragraph 20, it was specifically required that there be revised plans and specifications made by the commission engineer. Under paragraph 20, it was not sufficient for the plaintiff to have reported that it found conditions different from those indicated on the drawings and specifications; it was necessary under the terms of paragraph 20 that after investigation, the commission engineer "make such changes in the drawings and (or) specifications as he may find necessary." No such changes were made in the case at bar.

The requirement that the drawings and specifications be changed in order to qualify for extra compensation under the "changed conditions" clause is not one that the court can treat as insignificant. Without formalizing the proposed changes, the commission would be deprived of control over both the requirement for extra compensation and the amount thereof; if actual amendment of the drawings and specifications were carried out, the commission could determine when extra compensation would be required and the amount of such additional obligation.

The fact that the test borings supplied by the commission did not correctly predict the actual conditions which the plaintiff found is a circumstance which the

bidding instructions contemplated. In exhibit 22g, bidders are enjoined to "carefully examine the entire site of the work" so that they "may inform themselves thoroughly as to all the difficulties that may be encountered in the complete execution of all the work in accordance with the specifications and plans."

The test borings made by the commission do not purport to represent the conditions which would be found on the actual site of the sewer. The defendant's test borings were taken at 1000-foot intervals and were not offered as a guarantee of the conditions which would be found below ground at the actual site of the work. By applying their own judgment and experience, the plaintiff's experts were free to utilize the defendant's test borings in calculating their bid. The test borings accurately reflected the conditions at the immediate points tested; they were not offered to promise anything more.

The plaintiff argues that it would have been impossible for it, as a prospective bidder, to have conducted a thorough investigation of the proposed site, noting that boring operations conducted by the sewerage commission took 40 days. In my opinion, the impracticality of a separate investigation on the part of Faltore Company on the basis of either time or economics, cannot excuse the company from its legal and contractual obligations.

III. OTHER THEORIES OF LIABILITY

In support of its claim that there was a breach of warranty by the defendant, plaintiff contends that there was a failure to disclose the presence of rock above the sewer grade. In my opinion, the record does not support the plaintiff's conclusion in this regard; I find no misrepresentation on the part of the defendant.

In Shulse v. Mayville, 223 Wis. 624, 271 N.W. 643 (1937), the Wisconsin supreme court barred imposing liability upon a municipality to a contractor upon the principle of unjust enrichment. However, in the recent case of Blum v. City of Hillsboro, 49 Wis. 2d 667, 183 N. W. 2d 47 (1971), a new rule was adopted by the Wisconsin supreme court, which held that a vendor or contractor could maintain an action for unjust enrichment against a municipal corporation under a defective contract, provided there was no bad faith, fraud or collusion. The court said at page 671:

> "The object of statutory bidding requirements in connection with the letting of municipal contracts is to prevent fraud, collusion, favoritism, and improvidence in the administration of public business, as well as to insure that the municipality receives the best work or supplies at the most reasonable price practicable. 10 McQuillin, *Mun. Corp.* (3d ed.), p. 321, sec. 29.29, (1966 Revised Vol.). Thus recovery has been denied on the theory of unjust enrichment. This was because to permit recovery on principles of quasi-contract would seriously impair the protection intended to be afforded by the bidding statutes."

Although Fattore Company has not relied upon Blum v. Hillsboro, it is my opinion that no support for the plaintiff's position can be found therein; this is not a case of unjust enrichment; the plaintiff submitted a firm bid of $2,946,822, and when the last payment was made by the sewerage commission; the amount of $2,956,678 was paid to the contractor. It is thus apparent that the municipality has not been unjustly enriched but, on the contrary, it has paid the full amount which it had obligated itself by contract to pay. The case at bar is not one in which a municipality is seeking to retain benefits

under an invalid contract without paying the reasonable value thereof, but rather it is one in which the plaintiff seeks to impose extra charges upon the municipality in performing under a valid and enforceable contract for a fixed price.

This decision shall constitute the court's findings of fact pursuant to Rule 52(a), Federal Rules of Civil Procedure.

Now, therefore, IT IS ORDERED that the plaintiff's action be dismissed upon its merits and that judgment be entered in favor of the defendant for its costs in this action.

Dated at Milwaukee, Wisconsin, this 15 day of March, 1971.

/s/ Myron L. Gordon
U. S. District Judge

APPENDIX C

* * *

The Sewerage Commission has, so far as has been possible, located the underground and surface structures which may be encountered in constructing the work embraced in this proposal and has made test borings to determine the character of the ground likely to be encountered. Being public information any bidder may have access to it but the Sewerage Commission does not guarantee the correctness or accuracy of such information and does not guarantee that all the underground structures likely to be encountered are shown upon the plans, that the location of those shown is accurate, nor

that the character of the ground is uniform between borings, in fact, the Engineers anticipate that, during the work, underground structures of which the Sewerage Commission has no record or information will be encountered, and that there will be variations in the character of the ground between the test borings.

It is expected that each bidder will, prior to submitting his bid, ascertain the character of the soil through which the work is to be done, and obtain such other information as will assist him to make an intelligent bid.

* * *

Any verbal information obtained from or statements made by representatives of the Sewerage Commission at the time of the examination of the drawings, specifications, or site, shall not be construed as in any way amending the contract drawings and/or specifications. Only such corrections or addenda to the plans and specifications as are issued as addenda, notices or bulletins to all bidders shall become a part of the contract.

Bidders are requested to examine all drawings and data, and no plea of ignorance of conditions that exist, or of conditions or difficulties that may be encountered in the execution of the work due to any cause will be accepted as an excuse for any failure or omission on the part of the contractor to fulfill in every detail all of the requirements of the contract, specifications, and plans, governing the work to be done.

Bidders shall carefully examine the entire site of the work and the surrounding territory and the various means of approach to the site, and shall make all the necessary investigations to inform themselves thoroughly as to the facilities for delivering, placing and operating the necessary plant, making due inquiries from the

Chief Engineer as to where the plant and equipment can be located without interference with other work, and the facilities for delivering, storing and installing the equipment specified and handling material at the site of the work, and to inform themselves thoroughly as to all the difficulties that may be encountered in the complete execution of all the work in accordance with the specifications and plans.

* * *

19. *Changes.* The Engineer may at any time, by a written order and without notice to the sureties, make changes in the drawings and/or specifications of this contract and within the general scope thereof. If such changes cause an increase or decrease in the amount due under this contract, or in the time required for its performance, an equitable adjustment shall be made and the contract shall be modified in writing accordingly. No changes shall be made without first obtaining the approval in writing of the Engineer or his duly authorized representative. Any claim for adjustment under this article must be asserted within ten (10) days from the date the change is ordered, unless the Engineer shall for proper cause extend such time. But nothing provided in this article shall excuse the Contractor from proceeding with the prosecution of the work so changed.

20. *Changed Conditions.* Should the Contractor encounter, or the Sewerage Commission discover, during the progress of the work, subsurface and (or) latent conditions at the site materially differing from those shown on the drawings or indicated in the specifications, the attention of the Engineer shall be called immediately to such conditions before they are disturbed. The Engineer shall thereupon promptly investigate the con-

ditions, and if he finds that they materially differ from those shown on the drawings, or indicated in the specifications, he shall at once, make such changes in the drawings and (or) specifications as he may find necessary and any increase or decrease of cost and (or) difference in time resulting from such changes shall be adjusted as provided in Paragraph 19 of this contract.

* * *

1. WORK TO BE DONE

The work to be done under these specifications consists in furnishing all labor, tools, and appliances and all concrete and other materials, except as specifically stated to the contrary, and expendable equipment, and utility and transportation services necessary and constructing complete in a workmanlike manner, approximately 6,616 lineal feet of 144 inch diameter monolithic concrete sewer in S. Pennsylvania Avenue from E. Puetz Road to 1292.12 feet north of E. Drexel Avenue, including all drop manholes and appurtenant work, all as hereinafter specified and as shown on the plans, drawings Nos. 1 to 6 inclusive.

2. GENERAL DESCRIPTION

The Sewerage Commission of the City of Milwaukee plans to build a 60 MGD sewage treatment plant on a site at the shore of Lake Michigan opposite the end of Puetz Road (extended), south of South Milwaukee. The plant will be built partly out in the lake behind a revetment wall, on filled ground low enough for the sewerage to flow through the plant by gravity from the tributary main sewer.

The main sewer to deliver sewage to the plant will be provided by the Metropolitan Sewerage Commission of the County of Milwaukee.

This main sewer will be of monolithic concrete construction in tunnel, with invert elev. +5.01 at the outlet end. The sewer will extend from the foot of the bluff at Lake Michigan west under Puetz Road for a distance of about 1¾ miles and at depths varying from 70 feet to 125 feet below ground surface, to South Pennsylvania Avenue, thence north under the latter street. The main sewer in Puetz Road will be 150 inch diameter, circular section.

This contract covers the third section of main sewer, extending approximately 6,616 feet north on S. Pennsylvania Ave. from Sta. 78+83.73 located on E. Puetz Road, about 20 feet east of the center line of S. Pennsylvania Avenue to Sta. 145+100 on S. Pennsylvania Avenue, located about 1292.12 feet north of the center line of E. Drexel Avenue, six drop manholes, and accessory work.

* * *

4. BORINGS

The Metropolitan Sewerage Commission of the County of Milwaukee has made seven test borings along the route of that portion of the sewer in this contract. The logs and locations of these borings are shown on the drawings. A prospective bidder may make such additional borings or investigations as he may see fit, but permission to make additional borings and approval of proposed location of same must be obtained from the Commission.

* * *

APPENDIX D

ART 4. Changed conditions. Should the Contractor encounter, or the government discover, during the progress of the work subsurface and/or latent conditions at the site materially differing from those shown on the drawings or indicated in the specifications, or unknown conditions of an unusual nature differing materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in the plans and specifications, the attention of the contracting officer shall be called immediately to such conditions before they are disturbed. The contracting officer shall thereupon promptly investigate the conditions, and if he finds that they do so materially differ the contract shall, with the written approval of the head of the department or his duly authorized representative, be modified to provide for any increase or decrease of cost and/or difference in time resulting from such conditions.